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## Governmental Interest Analysis: A House Without Foundations

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### I. INTRODUCTION

Policy analysis has, apparently, come to mean all things to all people. Modern interest analysts have imbued the concept of policy analysis with almost enough elasticity that they can simply decide what would be a good result in a particular case and declare, by fiat, that the result furthers governmental policy objectives. The emptiness of the way the concept is now used reminds me of an interchange I once had in class with a clever third year student with certain southern charm. He was exceedingly bright, but often imperfectly prepared. When asked to describe a case one day, he was evasive about the facts. He appeared to have been alerted to the case's outcome by a friend in the next seat.

L.B.: Well, do you think the court reached the right result?

Mr. C: Yes. (smile)

L.B.: Why?

Mr. C: Well . . . , for pretty much the reasons the court gave. (much smiling in the class)

L.B.: So, Mr. C, do you know what those reasons were?

Mr. C: Yes, Professor Brilmayer. The court decided on policy. (much laughter by 140 other students and the professor)

As the students' laughter indicated, it is not very informative to say that a decision is based on policy. Policy analysis in the conflict of laws has come to include, among many other things: (1) reliance on substantive policies of the competing states; (2) reliance on policies of fairness; (3) reliance on policies of prevention of unfair surprise; and (4) reliance on the modern policy trend of complete compensation for any injured person. Any consideration thought important can be simply labeled a policy and incorporated into policy analysis.

Policy has been drained of meaning, perhaps in order to accommodate so many different viewpoints about what ought to be considered. Since policy analysis seems modern, commentators find it advantageous to describe their variations as policy analysis. The infinite elasticity of policy analysis has three implications.

First, it enables the proponents of the governmental interest analysis approach to choice of law to claim that their methodology has swept the field. Admittedly, there has been a revolution in conflict of laws in the last thirty years. Many fewer states now adhere to the First Restatement of Conflicts.<sup>1</sup> But it is not at all clear that the victory has gone to governmental interest analysis. There are at least a half dozen leading

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1. For a comprehensive discussion of where the fifty states now stand on the issue of choice of law methodology, see Kay, *Theory into Practice: Choice of Law in the Courts*, 34 *MERCER L. REV.* 521 (1983).

challengers to the old vested rights approach.<sup>2</sup> Many of these alternative approaches use the language of interest and policy. But whether they mean the same thing by that language is another matter. To determine how successful governmental interest analysis has been, one would have to know what the term means and whether other modern approaches are really following it.

Second, the elasticity of the concept facilitates avoidance of absurd results that the theory would otherwise seem to require. Sometimes this avoidance takes the form of discovering territorially based interests that allow a judge to reach a sensible result which would have been far easier to reach under a more explicit territorial theory.<sup>3</sup> Policy analysis, in such situations, seems to amount only to a requirement that the judge incant the proper magic words when justifying the clearly sensible thing to do. At other times, avoidance takes the form of noticing suddenly that more is at stake in formulating state choice of law rules than just local substantive policy. Thus, reasonableness, fairness, and predictability are enjoying a comeback.<sup>4</sup> While both of these forms of avoidance mitigate harsh results, one can only wonder what they have to do with analysis of policies or interests. More accurately, they constitute escape devices comparable to those that interest analysts criticized in the First Restatement. Currie himself was quite clear in saying it is no recommendation of a system that a clever judge can reach good results in spite of it.<sup>5</sup>

The third implication is the subject of this paper. Policy and interest have no clear meanings any more. The foundations of interest analysis, which Currie strived so hard to develop, are in complete disarray. One contributor to this symposium suggests that foundations are not important as long as good results are reached.<sup>6</sup> If this is a concession about the state of the underlying theory, it is welcomed. However, the idea that foundations are unnecessary is demonstrably wrong.

First, the idea presupposes, wrongly, that everyone is happy with the results that policy analysis imposes.<sup>7</sup> Not everyone is in agreement about which results are good and which are bad. Moreover, not everyone is happy; even the interest analysts are not happy with all the results.<sup>8</sup> When they criticize courts for applying interest

2. See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (the eclectic approach); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); Baxter, *Choice of Law Federal System*, 16 STAN. L. REV. 1 (1963) (the comparative impairment principle); D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965) (the principles of preference); Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965) (the *lex fori* approach); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966) (the "better law" approach). For a description of the resulting "mishmash," see Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983).

3. See, e.g., *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (Policy analysis also limits interests territorially.); *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (California's policy does not apply to contracts formed outside the state.); *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957) (California legislative policy does not apply when purchase occurred outside the state.). For use of territorial factors in policy analysis, see Reppy, *supra* note 2, at 668.

4. Both Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629 (1984), and Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack,"* 46 OHIO ST. L.J. 483 (1985), have emphasized reasonableness and fairness.

5. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 181 (1963).

6. Sedler, *supra* note 4, at 483.

7. *Id.*

8. See, e.g., Sedler, *Choice of Law in Michigan*, 29 WAYNE L. REV. 1193, 1215 (1983) ("strongly disagreeing")

analysis, they do so on the ground that the methodology was wrongly applied.<sup>9</sup> This presupposes a theory of interests which forms a basis for criticism, and this theory's premises and methodology need to be explained.

Second, if courts are reaching good results and foundations are not important, then the interest and policy terms are superfluous. Everyone could simply resort to intuitions of good results (the intuitions wrongly presupposed to be in complete agreement) without going through the analysis that Currie taught. But of course, the reason that Currie's method is to be used is precisely that it structures our intuitions. Currie realized this.<sup>10</sup> To say that as long as people like the results it is not necessary to be concerned with foundations is getting things backwards. Results are often liked because one shares a court's intuitions about the proper goals of choice of law theory.

Third, and most important, perhaps, there is a *need* for a theoretical foundation in novel or controversial cases if one is to think intelligently about what one wishes to do. Without an underlying theory, interest analysis is hardly more than a collection of recipes: one for guest statute cases, one for married women's contracting cases, and so forth. When one needs a recipe for something more exotic, one is simply out of luck. It just does not seem that one can really apply a choice of law analysis sensibly without knowing the underlying reasoning.

It is hard to believe that Currie would have made any progress if he and his predecessors had not attacked the First Restatement at its foundation. With all the available escape devices it possessed, it surely authorized some good results, at least to a practitioner willing to follow intuitions about "good results" in lieu of taking the methodology literally or seriously. Currie capitalized on the legitimate intellectual dissatisfaction that the First Restatement had provoked. He offered a more appealing intellectual structure which he spent great energies defending and with which he won many converts. It seems only fair that his replacement methodology be subjected to the same exacting intellectual scrutiny. Further, foundational problems are interesting.

This Article asserts that the foundations of interest analysis, as originally conceived, are fatally flawed. Interest analysis is prone to all of the problems that plagued the First Restatement of Conflicts, problems that Brainerd Currie criticized at length.<sup>11</sup> It reflects nothing more than the unexplained value preferences of its proponents. Attempts to strengthen those preferences methodologically are internally inconsistent and as intellectually unsatisfying as anything Joseph Beale had to offer. The ultimate irony is that the closer one looks, the more one finds that the so-called

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with "the majority view" on a particular issue); Sedler, *Dialogue*, 32 HASTINGS L.J. 1609, 1631 (1981) (acknowledging that most academics dislike Currie's solution to true conflicts, which Sedler approves of).

9. For example, Weintraub criticizes *Dym v. Gordon* as a misapplication of interest analysis. See Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493, 496 (1985). If there are right and wrong ways to apply interest analysis, the difference must be attributable to foundational concerns. See also *id.* at pp. 498-501. (discussing *Lillienthal v. Kaufman*, *Conklin v. Horner*, *Cipolla v. Shaposkas*).

10. See B. CURRIE, *supra* note 5, at 117 (Legislatures that think in terms of interests are unlikely to use territorial connecting factors: "As in many other instances, form exacts thought." *Id.*).

11. These include making metaphysical assumptions, presuming constitutional status for one's theories, and ignoring policies of democratically elected legislatures.

policy analysts do not care at all about what policy making institutions, the legislatures and common law courts, would prefer the territorial reach of their substantive decisions to be.

As the various foundational defects are exposed, this Article will note briefly various ways that current authors attempt to avoid these problems. It is sometimes claimed that interest analysis is not as simplistic as it used to be; that several decades of refinements have mooted these foundational criticisms of Currie's original work.<sup>12</sup> However, this is not the case. No one has answered these foundational criticisms. The best answers we get with regard to the criticized portion are: We can leave defense of Currie's ideas to his own superbly crafted articles;<sup>13</sup> Currie was not much of a constitutional scholar;<sup>14</sup> and other varieties of disclaimers and backpedaling.<sup>15</sup>

The refinements that supplement such disclaimers and backpedaling simply underscore the inadequacies of the original theory. The new emphasis on predictability, fairness, reasonableness, and the like does not fit comfortably with the old emphasis on fidelity to legislatively determined policy choices. At this point, it seems incumbent upon the defenders of the policy or functional approach to either rationalize this mongrelized development of Currie's original ideas, or admit that Currie's work was wrongheaded and that they have started again from scratch. If they are starting from scratch, there is a lot of foundational work for them to do.

In its attack on Currie's original theory, this Article focuses on three aspects of interest analysis that seem to be characteristic of mainstream interpretations. These are: (1) the methodology of statutory construction and policy interpretation; (2) the illustrative applications to fact patterns such as *Milliken v. Pratt*;<sup>16</sup> and (3) the constitutionalization of these results in the due process<sup>17</sup> and full faith and credit<sup>18</sup> clauses. This Article begins with a brief sketch of each of these aspects, and then shows how they contradict one another. The emerging modern responses (as yet there seems to be no consensus) are discussed at various places. Fuller discussion of these responses necessarily awaits more authoritative development of them by their adherents.

## II. ASPECTS OF MAINSTREAM INTERPRETATIONS OF INTEREST ANALYSIS

### A. Statutory Construction and Policy Interpretation

Currie was critical of the metaphysical assumptions of the First Restatement of Conflicts which relied on vested rights and territorialism. Aside from intellectual dishonesty, the basic vice of such a system was that it frustrated the substantive policies of the competing state laws in an arbitrary and capricious manner. The goal

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12. Sedler, *supra* note 4, at 484-85.

13. Weintraub, *supra* note 4, at 630.

14. Sedler, *supra* note 4, at 487.

15. Allo, *Methods and Objectives in the Conflict of Laws: A Response*, 35 MERCER L. REV. 565, 581 (1984) ("Whether Brainerd Currie was guilty of hidden normative thinking is not crucial to today's discussions." *Id.*).

16. 125 Mass. 374 (1878).

17. U.S. CONST. amend. XIV, § 1.

18. U.S. CONST. art. IV, § 1.

of Currie's methodology was to respond to policies directly. When only one state has a relevant policy preference, that state's law should be applied. If more than one state has a relevant policy, some substantive policy would have to be thwarted, but this is unavoidable in a world of different jurisdictions. At least, through careful attention to statutory policies, such policy frustration might be reduced to a bare minimum.

How is one to determine, however, whether a certain substantive rule supplies a relevant policy? Usually, the substantive rule says nothing about the proper geographical scope. Currie responded that while this might be a difficult task, at least it was a familiar one—the ordinary processes of statutory construction and interpretation.<sup>19</sup>

This premise of his methodology has fallen into disrepute in certain camps of interest analysts, although some authors such as Professor Weinberg continue to insist that "extraterritorial facts should be treated in precisely the same way as other problem facts."<sup>20</sup> It is worth reexamining Currie's writings to verify that he actually said this. The following three examples are illustrative:

When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. *This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.*<sup>21</sup>

This quote is from Currie's chapter on "Methods and Objectives," and is part of his clearest, simplest, and most direct statement of how his methodology is to be applied.

A second example concerns his approving remarks on *Lauritzen v. Larsen*,<sup>22</sup> delimiting the scope of the Jones Act.<sup>23</sup> After describing the Supreme Court's rationale, Currie wrote:

Like all statutory construction, such a decision [as the Court made] is essentially legislative in character; *the Court is trying to decide as it believes Congress would have decided had it foreseen the problem. . . . The profound difference between this approach and ["weighing" respective interests] consists in the fact that the process employed by the Court in these cases is avowedly that of statutory construction, and legislative correction is positively invited.*<sup>24</sup>

A third example arises in one of his later articles, discussing the New York trend in choice of law:

Governmental-interest analysis determines the relevance of the relationship by inquiring whether it furnishes a reasonable basis for the state's assertion of an interest in applying the policy embodied in its law. *Its methodology—while no one would claim for it ease of*

19. B. CURRIE, *supra* note 5, at 727.

20. Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 600 (1984).

21. B. CURRIE, *supra* note 5, at 183-84 (emphasis added).

22. 345 U.S. 571 (1953).

23. 46 U.S.C. § 688 (1982).

24. B. CURRIE, *supra* note 5, at 606 (emphasis added).

*application, or complete objectivity, or more precision than we ordinarily find in legal reasoning—is at least the familiar one of construction and interpretation. . . . It is explicitly an attempt to determine legislative purpose, and if that purpose is misinterpreted, legislative correction is invited.*<sup>25</sup>

Perhaps Currie was wrong. Latter day interest analysts will concede as much and then supply some other method for determining whether an interest exists. Still, it is clear what Currie himself had in mind. His methods supposedly (1) were based on statutory construction, (2) attempted to decide as the legislature would have decided had it addressed the issue, and (3) invited legislative correction if the court guessed wrongly.

### B. Illustrative Applications

While apparently clear in principle, this methodology is somewhat difficult to apply. Most legal rules have no direct instructions on their intended range of application. Currie recognized this,<sup>26</sup> and his treatment of a variety of concrete cases provides examples of what he thought “the ordinary processes of statutory interpretation” would entail.

One such example is his treatment of *Milliken v. Pratt*,<sup>27</sup> the married women’s contract case. He considered all of the different permutations of the facts in the case, assigning each of the elements of the fact pattern a situs in either Maine or Massachusetts. He then proposed to summarize his findings, discussing first the situations in which Massachusetts (the state that would invalidate) would have an interest in having its law applied:

Let us first attempt the formulation of a statement of interest and intention that may reasonably be attributed to a state legislature wishing to confirm its policy of protecting married women and to clarify the applicability of its law on that subject in conflict-of-laws cases.<sup>28</sup>

After much discussion, his proposed restatement was:

The provisions of this act shall be applied in all cases in which the married woman is a resident of this state, or of another state whose laws provide similar immunity.<sup>29</sup>

He then summarized Maine’s position as being that the act upholding married women’s contracts should be applied in all cases in which Maine is the residence of either or both parties.<sup>30</sup>

Currie went through similar exercises with many other cases, although usually in less detail. When discussing *Grant v. McAuliffe*,<sup>31</sup> for instance, he concluded that the Arizona law extinguishing a cause of action on the tortfeasor’s death would give rise to an interest “whenever the deceased tort-feasor was domiciled there, and also

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25. *Id.* at 727 (emphasis added).

26. *Id.* at 742.

27. 125 Mass. 374 (1878).

28. B. CURRIE, *supra* note 5, at 110.

29. *Id.* at 114.

30. *Id.* at 116.

31. 41 Cal. 2d 859, 264 P.2d 944 (1953).

whenever the action is brought in Arizona against an ancillary representative.”<sup>32</sup> California, on the other hand, has an interest “whenever the injured person is one toward whom California has a governmental responsibility. California may legitimately assert such an interest when the injured person is domiciled in (or a resident of) California, and also where he is present in the state at the time of injury.”<sup>33</sup>

Without such illustrative examples, governmental interest analysis does not get very far. How is one to know whether a statute is designed to apply? It seems entirely possible that a court might conclude that a statute was designed to apply to all accidents occurring within the state. One is reminded of that conflicts chestnut, the *Carroll* case, where a court interpreting an employer’s liability statute said:

Section 2590 of the Code, in other words, is to be interpreted in the light of universally recognized principles of private, international, or interstate law, *as if its operation had been expressly limited to this state, and as if its first line read as follows: “When a personal injury is received in Alabama by a servant or employee,”* etc.<sup>34</sup>

This was not the sort of statutory construction Brainerd Currie had in mind. Any conclusion can be characterized as statutory construction or policy analysis. In order to give the method relatively definable content and to exclude results such as *Carroll*, the interest analysts gave examples of what interpretation of policy ought to look like.<sup>35</sup>

### C. Constitutionalization

The third crucial aspect of governmental interest analysis consists of its assertion that a choice of law is unconstitutional if, but only if, it results in the application of the law of some state that does not have an interest.<sup>36</sup> Sometimes Currie went even further and asserted that it would be unconstitutional for a state to refuse to apply its own law on behalf of a resident simply because the accident, or contract formation, occurred out of state.<sup>37</sup> The latter assertion is a stronger statement. It would invalidate application of the law of the place of injury, for instance, even when the place of injury also happened to have an interest if the result was to deny the benefits of local law to a forum resident. An interest would not only justify application of forum law; it would require it.

Currie supposedly derived this result from both Supreme Court precedent and the constitutional text. The main constitutional provision that he relied upon was the due process clause, although he also discussed the equal protection and full faith and credit clauses. Currie claimed that a state’s desire to apply its own law when the result would be protection or compensation of local residents could hardly be said to be so

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32. B. CURRIE, *supra* note 5, at 146.

33. *Id.* at 144–45.

34. *Alabama G.S.R.R. v. Carroll*, 97 Ala. 126, 134, 11 So. 803, 807 (1892) (emphasis added) (emphasis of “is received in Alabama” in original).

35. Allo, *supra* note 15, at 571 (without normative constraints, interest analysis deteriorates into quagmire).

36. B. CURRIE, *supra* note 5, at 123, 146, 162.

37. *Id.* at 163.

irrational as to violate the due process clause.<sup>38</sup> Instead, it would violate due process of law for a state to refuse to apply its laws simply because of some absurd territorial deference to the law of the place of the accident.<sup>39</sup>

The cases that Currie cited for this proposition did not all rely upon the interest terminology. For instance, *Home Insurance Co. v. Dick*<sup>40</sup> arguably supported his thesis even though it did not speak of interests because Texas had applied Texas law to the benefit of someone who was not a bona fide Texas domiciliary.<sup>41</sup> The cases which did use the term "interest" are the workers' compensation cases, *Alaska Packers Association v. Industrial Accident Commission*<sup>42</sup> and *Pacific Employers Insurance Co. v. Industrial Accident Commission*.<sup>43</sup> These cases were decided before Currie propounded his theory, but in *Allstate Insurance Co. v. Hague*,<sup>44</sup> which was decided more recently, several justices did cite him approvingly.<sup>45</sup>

The above three features—statutory construction, illustrative solutions, and constitutionalization—are defining aspects of Currie's interest analysis. There are, of course, other important characteristic features. For instance, Currie was concerned about the proper resolution of true conflicts;<sup>46</sup> his solution sets his approach apart from some others. Another important aspect is the way interest analysis is applied in practice. Judges employing interest analysis may depart from Currie's paradigm examples in significant ways, and a complete critique would have to take these modifications into account. This Article, however, is not a complete critique. It is primarily an effort to identify certain crucial foundations of the analysis of governmental interests and to show that they are inconsistent with one another.

### III. FOUNDATIONAL INCONSISTENCY OF INTEREST ANALYSIS

The claim of this Article is that each of the three premises listed above is inconsistent with the others. This assertion invites three comparisons. First, do the examples that Currie gave really conform to the methodology of statutory construction and interpretation? Second, is constitutional justification really a process of statutory construction and interpretation? Third, do the illustrative applications have adequate constitutional justification? The answer to all three of these questions is "no."

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38. *Id.* at 161 (discussion of the constitutionality of applying California law in *Grant v. McAuliffe*).

39. *Id.* at 163. The reasoning would apparently invalidate state long-arm statutes that premise jurisdiction on local injury.

40. 281 U.S. 397 (1930).

41. *Id.* at 405.

42. 294 U.S. 532 (1935).

43. 306 U.S. 493 (1939).

44. 449 U.S. 302 (1981).

45. *Id.* at 335 (Burger, C.J., Powell, J., Rehnquist, J.).

46. His original solution was to apply forum law. See B. CURRIE, *supra* note 5, at 184. Later, he modified this view somewhat. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963).



### A. Illustrative Applications and Statutory Construction

The most basic and obvious problem with Currie's "interpretations" of legislative policies in illustrative cases is that they are naked conclusions. Consider his analysis of *Milliken v. Pratt*:<sup>47</sup>

It is surely not a difficult matter to formulate the legislative policy in this case. . . . Massachusetts, in common with all other American states and many foreign countries, believes in freedom of contract, in the security of commercial transactions, in vindicating the reasonable expectations of promisees. It also believes, however, that married women constitute a class requiring special protection. It has therefore subordinated its policy of security of transactions to its policy of protecting married women . . . .

What married women? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women.<sup>48</sup>

Now where did this "of course" come in? Why not say, "Why, those with whose welfare Massachusetts is concerned, of course—married women entering into contracts in Massachusetts"? or "married women whose property is located in Massachusetts"? or any other connecting factor that might be singled out? Currie later simply referred to this crucial premise as having been shown.<sup>49</sup> Through endless repetition and self-evident treatment, the rabbit was placed into the hat with great fanfare and then pulled triumphantly out. Every one of his examples proceeds the same way.

Currie once stated that "[a] legislature is not likely to append to any statute dealing with a specific problem any such rule as that the law of the place where the contract is made shall control."<sup>50</sup> But as Maurice Rosenberg and I have argued elsewhere, the vast majority of legislative choice of law provisions actually take exactly this old-fashioned territorial approach.<sup>51</sup> Further, even when the legislature does use domiciliary connecting factors instead of territorial ones, it does not condition applicability upon the result being beneficial to local residents. There is a world of difference between a divorce law applying to forum domiciliaries whether they like it or not and a choice of law methodology which ascertains whether a rule is helpful or hurtful to the local residents before deciding whether there is an interest in applying it.<sup>52</sup>

That Currie's illustrative examples do not amount to the ordinary process of statutory interpretation is demonstrated by the interest analysts' annoyance with those

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47. 125 Mass. 374 (1878).

48. B. CURRIE, *supra* note 5, at 85.

49. For instance, he asserted on the basis of such reasoning that traditional rules frustrated "interests" in certain percentages of cases. *Id.* at 163.

50. *Id.* at 116.

51. I am indebted to Professor Rosenberg for convincing me that "statutory construction" was both the linchpin in the analysis and its weakest link. See Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 958 (1981). See also Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); cf. W. REESE AND M. ROSENBERG, *CONFLICT OF LAWS* 553-56 (7th ed. 1978). For another discussion of statutory choice of law rules, see Kozyris, *No Fault Automobile Insurance and the Conflict of Laws—Cutting the Gordian Knot Home-Style*, 1972 DUKE L.J. 331.

52. Brilmayer, *supra* note 51, at 426. The arguments about legislative choice of law provisions are supposedly refuted in R. CRAMPTON, D. CURRIE, & H. KAY, *CONFLICT OF LAWS* 249 (2d ed. 1983). However, the domiciliary choice of law provisions that they cite apply to locals *regardless* of whether locals are benefitted or burdened. Thus, they are inconsistent with Brainerd Currie's theories.

statements of legislative purpose that contradict them. Sedler, for instance, has explicitly indicated that legislatures should stay out of the choice of law field because legislatures would probably adopt traditional choice of law rules.<sup>53</sup> One example of Currie's disregard is in his treatment of *Grant v. McAuliffe*.<sup>54</sup> In that case, the California Supreme Court had reached a decision consistent with interest analysis, although through a rather different route. A law reform commission had been extremely critical of the decision, which manipulated the substance/procedure distinction to reach the desired result, and had considered legislation to require the courts to treat survival of actions as substantive. Currie applauded the decision not to recommend the statute:

The Commission is to be congratulated on its decision not to recommend legislation on the question of what law shall govern survival of actions. The California Supreme Court is one of several courts in this country that are making serious efforts to break away from sterile formalism and to develop a rational approach to conflict-of-laws problems. . . . Legislation that would have placed this vigorous court in the metaphysical irons forged by Professor Beale and the American Law Institute would have been reactionary in the extreme.<sup>55</sup>

This is a very strange position, indeed, for one whose primary methodological goal is to further legislative purposes. Why should it matter whether those legislative purposes are territorial or Currie-based? Furthermore, the very objective of phrasing things in terms of interests was supposed to be that it "positively invited legislative revision."<sup>56</sup> Obviously, Currie was hostile to legislative revision of results that he liked if the revisions reflected premises he did not like. He preached that the greatest good is obedience to the legislative will; but he balked at following the legislature's lead when it adopted a choice of law approach of which he disapproved. In contrast, he encouraged legislatures to adopt choice of law provisions as long as they did not fall under the spell of territorialist dogma.<sup>57</sup> What appears to have mattered to Currie was not whether legislative purposes were fulfilled, but whether results conformed to the type of interests he recognized in his illustrative applications.<sup>58</sup> So long as legislatures followed his methods, their activities were to be encouraged.

A second example of interest analysts' disregard of any legislative preferences not coinciding with their illustrative solutions involves the treatment of other states' choice of law rules. Currie explicitly stated that there was no reason to look at the other state's choice of law rules.<sup>59</sup> Why not? Who is more adept at construing the legislative purposes of a statute than the courts of the same state? Surely the forum court has no superior expertise in interpreting that state's policies. Should not it take at face value the other state's determination of whether an interest exists? Perhaps the reason for disregarding the other state's choice of law rules is that they might be

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53. Sedler, *Dialogue*, *supra* note 8, at 1636.

54. 41 Cal. 2d 859, 264 P.2d 944 (1953); discussed in B. CURRIE, *supra* note 5, at 128-76.

55. B. CURRIE, *supra* note 5, at 131-32.

56. *Id.* at 606.

57. *Id.* at 116-17, 170-71.

58. *Id.* at 184.

59. *Id.*

polluted by vested rights assumptions. But it is hard to argue that the other state need cite Currie or use the term interest to earn deference to its choice of law conclusions. At any rate, Currie never recognized that the forum might defer even to ascertainment of interests by states that had adopted the methodology of statutory construction and interpretation.

A similar line of reasoning would counsel scholars, as well as other states' courts, to attend carefully to the state's interpretation of its statutes. Currie apparently felt better able to interpret the legislature's policies than the courts institutionally empowered to do so, at least when those courts were hypnotized by territorialism. Perhaps the courts' function is to tinker around with trivial modifications in application of the interest concept.<sup>60</sup> Neither Currie nor his followers would grant a state the right to define its own interests according to the manner of the First Restatement, even if it cast its conclusion in terms of statutory construction.<sup>61</sup>

In this context, notice also what happens when the substance of the controversy depends on common law rules of decision. A court is in a position to alter common law rules through overruling or through modification since it has within its grasp the power to create or redefine policy. Its statements about the proper reach of the rule are comparable to legislative choice of law rules. If Currie had been correct, then the power to formulate policy would include the power to specify territorial reach because the latter is a species of policy decision. Just as a court may interpret the rule in marginal domestic situations, or decide whether to apply it retroactively, so it should be able to define the territorial reach.

This means two things. First, other states that adhere to policy analysis should respect this interpretation of state policy. The courts of state *A* should not second guess the courts of state *B* when they define state *B*'s common law. Second, the common law judge has total control over whether or not to find an interest. Since the judge can determine the content of local policy in matters left to common law courts, the judge can also make the policy decision of whether the law should be applied. Interest analysis does not tell the judge whether to abolish charitable immunity or to create an exception to the local guest statute. Why should it instruct judges on other policy matters?

All of this talk about willingness to defer to state policy decisions is pure bunk. *Of course* state courts should follow legislative choice where possible and where no constitutional problems arise. It is just that interest analysis makes little if any effort to do so. Interest analysis is *not* a value neutral methodology that simply seeks implementation of the policy preferences of the legislature or common law court. Interest analysts have a very strong set of normative premises which enable them to contradict or belittle the preferences of legislatures and courts if those preferences resemble that "dogma,"<sup>62</sup> that "sterile formalism,"<sup>63</sup> that "mindless and ruthless

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60. Currie made suggestions about what statutes to draft. *Id.* at 171. Presumably such options are also the ones open to courts in interpreting statutes. These options leave little, if any, leeway for choice.

61. Allo, *supra* note 15; cf. Weintraub, *supra* note 4 (choice of law provision may limit but apparently may not create the interest).

62. B. CURRIE, *supra* note 5, at 658.

63. *Id.* at 131.

machine,"<sup>64</sup> the First Restatement of Conflicts. The normative premises embodied in their illustrative applications are in no way founded on the ordinary processes of statutory construction and interpretation, coupled with a sincere desire for legislative correction should the court have misunderstood the first time around. The illustrative examples simply indicate what interest analysts think that legislatures *ought* to want.

Modern day policy analysts have elaborated on Currie's scheme in ways which purport to address these inconsistencies. First, most modern policy analysts agree that state *A* need not take state *B*'s choice of law rules into account in determining whether state *B* has an "interest."<sup>65</sup> Second, these analysts seem to indicate that legislative intent has little, if anything, to do with the determination of "legislative policy."<sup>66</sup> This leads to some awkward results. For one thing, it means that policy interpretation ignores actual statutory directives. Whether there is a policy reason to apply local law would no longer depend on whether the legislature would want the rule to be applied. In fact, it is only when the legislature is silent that there is even a pretense that interest analysts are doing what the legislature wants them to do. When the legislature or authoritative interpreter such as a local court has spoken, the forum's court must nevertheless reexamine the legislature's choice to determine whether the legislature was correct about what would best fulfill its own policy preferences.

Furthermore, without the ordinary processes of statutory construction and interpretation, how precisely are we to know whether policies are being fulfilled? Weintraub says that there is a policy interest if the impact of the decision would be felt in the state.<sup>67</sup> He makes a better attempt than most at spelling out what this might mean, but he still proceeds hypothetically and without any sort of empirical verification. For instance, he calls for "realism" in determining whether a rule embodies deterrent policies, but is willing to operate on speculation that there will be a local impact if a local citizen is denied recovery.<sup>68</sup> One would hope for either theoretical elaboration or empirical verification—or both—before accepting such assumptions.

If time and space permitted, this Article could go into a more thorough analysis of the merits and demerits of this assumption about legislative policy.<sup>69</sup> The most common argument for "help the local" interests is that state welfare systems are only available to locals, so that applying local law keeps the welfare bills as low as possible.<sup>70</sup> This reason has often been advanced, although Currie certainly did not advance it on the facts of *Milliken v. Pratt*.<sup>71</sup> Mrs. Pratt was probably not headed for the welfare rolls.<sup>72</sup> The welfare rolls rationale likewise does not work very well when

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64. *Id.* at 161.

65. *See supra* note 61.

66. At least they disregard legislative choice of law rules in determining whether interests exist. *See id.*

67. Weintraub, *supra* note 4, at 631-34.

68. *Id.*

69. Whether their normative definitions are desirable is discussed in Brillmayer, *supra* note 51, at 402.

70. *See, e.g.,* B. CURRIE, *supra* note 5, at 61, 150-51 (injured person may become public charge); *see also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 319 (citing lower court's definition of state's interest in keeping injured persons off welfare rolls).

71. 125 Mass. 374 (1878).

72. Whether there was a welfare system in place at all in 1878 is open to question. Furthermore, there is no indication whether Mrs. Pratt was so close to the poverty line that losing this litigation would push her over the brink.

commercial interests are involved since few states have bail-outs for destitute corporations. It finds its most fertile territory in tort law and picks up some support along the way from the underlying general policies of tort law. The underlying purpose of tort law is to provide compensation, which keeps accident victims off of the welfare rolls.<sup>73</sup> Tort laws spread the losses to the defendant and his or her insurer.

This supposed policy analysis really does not make a lot of sense. Leave aside, for the moment, the fact that tort law amounts in large part to compensation for tort lawyers. For precisely this reason, the modern trend, if there is one, is away from traditional tort law to no-fault or first party insurance. Ignore the fact that tort law antedated welfare by centuries. Disregard the fact that there is no greater reason to assume automatically that the plaintiff will go on welfare without tort compensation than that the defendant will go on welfare if forced into bankruptcy by imposition of liability. Defendants often have insurance, it is true, but then so do plaintiffs. If the plaintiff pays for Blue Cross coverage, why should not he or she use it?

Instead, the larger point is that loss spreading is a poor rationale for applying tort law to keep people off of the welfare rolls. If the goal is to spread losses, is not the ultimate deep pocket the government? The loss should arguably be spread to the taxpayers, a larger group than defendants or their insurance companies and those who pay insurance premiums. This is precisely what happens when an indigent victim suffers injury without a responsible tortfeasor (for example, as a result of a contagious disease). It is only when some enterprise is thought to be the appropriate party to bear a loss that it gets selected for loss spreading. This, of course, is the ultimate question in the case: Is the defendant an appropriate individual to whom to spread the loss?

Compensation and loss spreading alone do not really answer the question. The precise question is whether compensation and loss spreading are appropriate in this case, and of course that can only be answered *after* it is known which substantive law applies. There is no common policy of loss spreading in all circumstances. Indeed, not a single state has a policy to this effect. No state in the country has a tort law that guarantees every injured person a defendant to pay the bills. Every state's tort law asks whether, how much, and from whom.

It would be just as sensible to perceive an underlying common policy of limiting imposition of liability to persons who violate tort law. There is no complete agreement on when to limit imposition of liability, but lack of consensus is no more devastating to the common policy of limiting liability than the common policy of providing compensation. Some functional analysts apparently assume that if some compensation is good, more is better. The notion that "the reason we have tort law is that injured people should be compensated in certain circumstances" is translated into "the reason we have tort law is that injured people should always be compensated." This is *their* assumption, and not a reasonable attempt to interpret the policy choices of legislatures. But that seems to be where modern policy analysis has ended up: the

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73. See, e.g., Weintraub, *supra* note 9, at 504 (presumption in favor of recovery). For a discussion of such underlying common policies, see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 201-03 (1981).

choice of law process is designed to implement policies, but it is the policies of a select group of choice of law scholars, not the policy choices of those legal institutions empowered to adopt and interpret state law,<sup>74</sup> that are to be implemented.

### B. *Constitutional Justification and Statutory Construction*

If statutory construction does not lead one to Currie's reasoning in his illustrative examples, neither does it amount to a process of constitutional justification. Of all three comparisons, this is the easiest incompatibility to demonstrate.

Currie claimed that the worker's compensation cases<sup>75</sup> showed that his method was required by the Constitution.<sup>76</sup> As Dean Ely has remarked, "This belief is so plainly the result of wishful thinking as not to merit extended rejoinder."<sup>77</sup> The worker's compensation cases, in particular, suggest an opposite conclusion. In those cases, California had a choice of law provision in the statute that directed application of California law. If interest means statutory construction in the usual domestic sense, then it is clear that there were interests in both of those cases. There would be no need to examine the reasons why legislatures enact worker's compensation statutes, or to point out that the injured party's relatives might have to care for him or her. Interest would follow automatically from the statutory choice of law provision.

Furthermore, if Currie's purported method were adopted, it would be difficult to imagine how the Supreme Court could ever contradict the state on its holding that there was an interest. After all, the state is the authoritative interpreter of state policy. The Supreme Court does not have jurisdiction to determine issues of state law.<sup>78</sup> If interest is no more than a question of domestic statutory construction, then the Supreme Court would have no right to review a state court's finding that legislative jurisdiction did or did not exist.

At times, Currie seemed to suggest strongly that the Supreme Court had no business interfering with the state's assertion of its own interests. He argued that it lacked the authority to balance states' interests and to declare one more weighty than another.<sup>79</sup> This begs important questions. When either a domestic law or choice of law decision is examined for constitutional adequacy, the Court compares that law to the pertinent federal standard as best it can. Asking whether a law violates the first amendment is not different in this sense from asking whether it violates due process or full faith and credit. The rule being examined is assessed against federal constitutional concerns, not just balanced against the interests of other states. One need not ask which of the competing *states'* interests is weightier; it is clear that the federal interest is the weightiest one and supplies the basis for evaluation.

Currie's argument actually exacerbates his theory's problems in using statutory construction as the method for determining interests. If a state can ascertain an interest

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74. Compare Dean Ely's criticism of the "common policy" analysis in Ely, *supra* note 73, at 202-03.

75. *Alaska Packers Ass'n. v. Indus. Accident Comm'n*, 294 U.S. 532 (1935); *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

76. Currie, *supra* note 5, at 188-360.

77. Ely, *supra* note 73, at 180.

78. *Murdock v. Memphis*, 87 U.S. 590 (20 Wall.) (1875).

79. B. CURRIE, *supra* note 5, at 117.

simply by construing or interpreting its own state law, then, if there are to be any federal constitutional limits on what a state may do, the Supreme Court must be prepared to subordinate the state interests so ascertained. Conversely, if existence of an interest is sufficient in and of itself, without any federal balancing, then interests cannot be created purely by the state's policy determination of what interests it has. There must be some federal limit at either the identification or the balancing stage. If the Court may not balance, it must use independent judgment in determining whether interests exist.

Currie sometimes spoke of valid or legitimate interests. It was these valid interests that gave a state a right to apply its own law.<sup>80</sup> Moreover, he did not actually seem to believe that the Supreme Court had to take the state's assertion of an interest at face value; only once an interest was identified was the Court supposed to defer. However, he never spelled out how to determine whether an interest was a valid interest since he only offered one methodology: statutory construction and interpretation. This reduces the separate state and federal law inquiries to a single approach since both use the same definition of interest. And if the methodology of statutory construction is taken seriously, it dissolves the federal limitations altogether.

### *C. Illustrative Applications and Constitutional Justifications*

When pushed to the wall, interest analysts might be expected to discard the premise of statutory construction and to retain both the illustrative applications and the argument that these encompass the constitutional definition of interest. This would be the most plausible response since the premise of statutory construction proves so problematic. The argument would proceed on unabashedly normative foundations—metaphysical ones, if you will—to the effect that these examples illustrate how a legislature ought to approach such problems in order to proceed rationally and constitutionally.

For the Supreme Court to adopt this approach would require rewriting many of its precedents and invalidating much state law. Much state law, of course, reflects the First Restatement, the Second Restatement, or some other methodology inconsistent with Currie's. As noted earlier, most state choice of law statutes are territorial in the old-fashioned sense. These would perhaps all be unconstitutional. Adoption of governmental interest analysis as *the* constitutional theory would lead to a choice of law bloodbath.

Supreme Court case law would also have to be rewritten because even those cases that use the term interest are not really using it in the Currie sense. For example, the Supreme Court seems to have suggested that a state may have an interest by virtue of traditional connecting factors such as the place of the injury<sup>81</sup> or the place of contracting.<sup>82</sup> In addition, many federal cases, including Supreme Court cases, have

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80. *Id.* at 155, 162, 213 ("legitimate" interests).

81. *See, e.g.,* *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Watson v. Employers Liab. Assurance Corp., Ltd.*, 348 U.S. 66 (1954).

82. *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578 (8th Cir. 1981), *aff'd*, 454 U.S. 1071 (1981), *See also* Ely, *supra* note 73, at 180.

used territorial connecting factors in deciding whether to apply American law to cases with international elements.<sup>83</sup> The Court has stated in that context that the issue is one of statutory construction and "the canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant only to apply within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained."<sup>84</sup> These cases provide a refutation of unsupported assertions by certain authors that allowing the result to change depending on where injury occurs violates equal protection principles.<sup>85</sup>

Moreover, the Supreme Court has held that a federal court must adhere to the choice of law methodology of the state in which it sits even if the method reflects outdated territorial principles. In *Day & Zimmerman, Inc. v. Challoner*<sup>86</sup> the Court reversed a lower federal court's effort to substitute interest analysis for the state's own choice of law. In that case, it is true, the Court did not directly address any constitutional issues implicit in the facts. But this is not to say that it deliberately reserved that issue. The more likely explanation is that it thought the constitutionality of applying the place of wrong rule too clear to require elaboration.

Precedents therefore do not support the constitutionalization of governmental interest analysis; these would have to be drastically modified at the same time that most state choice of law rules were invalidated. The result would be an incredibly intrusive constitutional choice of law methodology. Indeed, some interest analysts have suggested that there is no room for state law on the subject at all; both upper and lower limits are prescribed by the Constitution.<sup>87</sup> No support has yet been offered for the "clear" inference that the state has an interest in protecting locals<sup>88</sup> and that to assert this interest would be the "clearly constitutional" thing to do.<sup>89</sup> Furthermore,

83. For example, the Restatement mentions occurrence of conduct or effects within the territory as bases of jurisdiction. RESTATEMENT OF FOREIGN RELATIONS LAW § 402 (Tent. Draft No. 2, 1981).

Cases interpreting the reach of American law abroad have characteristically turned on occurrences of either events or injury within the United States. See, e.g., *United States v. Arra*, 630 F.2d 836, 840 (1st Cir. 1980) (sovereign may exercise jurisdiction over acts done outside jurisdiction if likely to produce detrimental effects within); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (interpreting Sherman Act with "effects" test). See also *Psimenos v. E.F. Hutton*, 722 F.2d 1041 (2d Cir. 1983); *Continental Grain v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979) (securities laws do not apply unless conduct or effects in United States).

Some courts apply American law simply because the burdened party is an American, a fact which is of little help to interest analysis. See, e.g., *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Blackmer v. United States*, 284 U.S. 421 (1932). Others explicitly state that local residence of a beneficiary without more is not sufficient. See, e.g., *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975) (securities laws do not apply to sales to American citizens abroad unless acts of material importance occurred in United States).

84. *Foley Bros., Inc., v. Filardo*, 336 U.S. 281, 284 (1949).

85. See, e.g., *Allo*, *supra* note 15, at 571 (application of place of injury rule unconstitutional).

86. 423 U.S. 3 (1975) (requiring federal court to apply the Texas "place of wrong" rule).

87. *Allo*, *supra* note 15, at 581 (Constitution sets both upper and lower bounds; "choice of law never really was a state law field." *Id.*).

88. An example of an author simply asserting this premise, preceded by an "of course," is Weinberg, *supra* note 20, at 620. Her "authority" for this obvious proposition is *Gibbons v. Ogden*, 22 U.S. 1, 208 (1824). She also asserts in support that the state has a right to impose its law to the detriment of locals. The fact that a state may impose a law on residents is hardly proof of an ability to impose it on nonresidents. For the latter proposition she cites a court of appeals case, *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

89. Weinberg dismisses discrimination arguments on the grounds that "the nonresident is rather easily distinguished from the resident," namely because "a nonresident is not within the intended scope of the rule." Weinberg, *supra* note 20, at 596 n.4. If the failure to intend to provide benefits is all that it takes to differentiate residents from nonresidents, it is true that no discrimination problems arise. On this theory, we would also by definition uphold differential treatment



there is some reason to remain skeptical about whether interest analysis will ever make any progress on these issues; as a selfish (even if rationally selfish) methodology of states seeking to maximize local interests, it does not come well equipped to justify itself on constitutional grounds.

The reason is that the illustrative examples that Currie provided rarely address the issue of fairness to the party protesting application of forum law. As Currie conceived of it, the goal of interest analysis was that the forum should advance its own interests. The method was avowedly self-serving. As a constitutional matter, it is not immediately obvious what evil would be prevented by the constitutionalization of the requirement of self-interest. Apparently, the vice which Currie sought to eradicate was one state's meddling in the concerns of another. A state was only supposed to apply its law when it had a good (that is, selfish) reason to do so.

However, there are problems other than irrational intermeddling; self-interest is not necessarily the touchstone of constitutional legitimacy. Principle, and not self-interest, is the key. Consider how peculiar moral justifications would sound if based solely on self-interest. Suppose a group of muggers assaults a person on the street, demanding his wallet. They need money, it would advance their self-interests to have his credit cards, and so forth. This explains why, as a rational matter, they happen to want his wallet, but it does not provide a justification for taking it. The muggers are not intermeddling; they are advancing self-interest. Intermeddling, though, is not the only vice.

Interest analysts sometimes seem to proceed on the assumption that constitutional justification consists of the state merely explaining how application of local law furthers local interests. What is lacking is an explanation of why it is fair to the complaining party to impose a law to which he or she objects. This process of justification is the essence of constitutional adjudication. If a state simply decides that the cheapest way to build a new interstate highway is to confiscate one's property, then this "taking" of property would be invalidated under the fifth and fourteenth amendments. The fact that it is perfectly rational for the state to want to do this is really beside the point, as is the muggers' explanation of why they want someone's wallet. There is no guarantee that a rational state's interest will coincide with the preservation of individual rights or the rights of other sovereign states. In fact, in commerce clause and equal protection cases the Court has been quite clear that a mere desire to further local interests at the expense of outsiders is not by itself a constitutionally cognizable justification.<sup>90</sup> The Constitution was adopted in part to prevent such "rational" aggrandizement of local interests.

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of any other group not entitled to strict scrutiny. All the legislature would have to do would be to delete the disfavored group so that it is not within the intended scope of the rule. This position was rejected in *Metropolitan Life Ins. v. Ward*, 105 S. Ct. 1676 (1985).

For a discussion of discrimination issues, see generally Ely, *supra* note 73. This is one of his many points handled unconvincingly or misunderstood by Professor Weinberg.

90. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (desire to protect local farmers from outside competition not justifiable as economic welfare or health measure); *Metropolitan Life Ins. v. Ward*, 105 S. Ct. 1676 (1985) (desire to benefit locals at expense of out-of-staters not a legitimate state interest under equal protection clause).

To the extent that interest analysts rely upon the welfare rationale, they only highlight the problem. The fact that the state reduces its welfare budget by making the defendant pay is not of any solace to the defendant. Could the state simply choose individuals at random from the population and force them to pay the medical bills of the injured party on the theory that this lowers welfare costs? The state also lowers its tax bills if it simply confiscates one's property for construction of an interstate.

When asked to shoulder the cost of social benefits, the complaining party will naturally ask, "Why me?" Tort law answers this question by pointing out that the defendant manufactured harmful products, or ran the victim over, or defamed the victim. Compensation is only half the answer since it does not explain who should do the compensating. Just as domestic law provides an explanation for why the defendant should bear the burden, so choice of law should explain why it is fair that domestic law be applied. Whether the answer turns on the complaining individuals' affiliations with the state, their reasonable expectations, or their entrance into the state voluntarily to commit a tort, some justification must be given. Currie offered none.

Some modern authors attempt to incorporate extra notions of fairness, reasonableness, predictability, and so forth. These would help to mitigate the harsh results that interest analysis, as Currie saw it, might well dictate. Yet it results in a radical transformation of the conflicts methodology. First, it is not sufficient merely to bring these considerations into play once a true conflict, in the Currie sense, has been identified. Such half measures are scarcely reassuring to a critic who thinks that the very notion of interest is fundamentally flawed. If fairness is important, then it ought to be incorporated into all choice of law analyses, even the identification of the supposed false conflicts.

Second, once these values are recognized, how do they fit into the calculus of interests? Are they part of the decision whether an interest exists? If so, they may conflict with the principle of statutory construction. Or are they an extra requirement, which must also be satisfied even if the forum has an interest? If so, they seriously qualify the fundamental premises of interest analysis, which supposedly only consider the furtherance of state policies. It is not clear that adherents of such approaches can properly be said to engage in policy analysis at all, as some of these analysts seem to recognize.<sup>91</sup> Such analysts seem to be engaging in the same sort of subjective balancing that Currie criticized in the grouping of contacts theory.<sup>92</sup> An unstructured list of contacts or considerations such as policy and fairness is more like the Second Restatement than like Currie's brand of interest analysis.

#### IV. THE SOURCE OF FOUNDATIONAL PROBLEMS

Interest analysis generates the above foundational problems because it tries to do two inconsistent things with the same conceptual test: to describe what states *do* want and to prescribe what states *may* want. The first objective is descriptive, and the

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91. See, e.g., Weintraub, *supra* note 9, at 493 (recognizing that Currie might characterize his work as heresy and stating that policies are not the Alpha and Omega).

92. B. CURRIE, *supra* note 5, at 728.

second is normative. The difference between a descriptive and a normative approach can be illustrated by the following thought experiment.

Assume that one is a state legislator who is involved in drafting a new bill, such as a products liability statute, which is likely to be enacted. Someone suggests that the bill ought to contain a choice of law provision. The substance of the bill has been generally agreed upon; it limits strict liability in cases of design defects. How many reasonable options are available as choice of law provisions?

One view suggests that choice of law decision making is itself a policy making enterprise. There are good things and bad things to say about a test based on place of manufacture, strengths and weakness in a test based on domicile of the injured party, and so forth. The legislature, as a policy maker, can choose from these many options as it sees fit. One may dislike the legislature's choice, just as one may dislike the substantive provisions in the statute. But that is a disagreement about what policy the legislature ought to adopt; the legislature undoubtedly has the power to make choices with which some will disagree.

The other view is that the legislature has only a limited number of reasonable options, or perhaps only one. For instance, it might be thought wholly irrational to make application of this liability-limiting law contingent upon local occurrence of the injury complained of.<sup>93</sup> While the legislature undoubtedly has the right to make substantive policy choices upon which there will be disagreement, under this view, a stronger charge can be levelled against them if they make a stupid choice of law decision. Once the substantive policy has been agreed upon, under this view, there are naturally and necessarily certain consequences for the proper choice of law reach of the statute. A mistake in framing a choice of law rule is qualitatively different from a stupid substantive decision; the latter is entitled to deference, but the former is not.

The first view is descriptive, and the second is normative. Under the first view, the important question involves what the legislature actually wanted, either explicitly or implicitly. Of course, a critical observer has the right to make normative conclusions in addition. He or she might feel that the legislature's choice of law decision is stupid. This is no different, though, from thinking that the substantive decision is stupid. In both cases, a critical observer realizes that what the policy *is* is a different question from what the policy *ought to be*, and that courts ordinarily care more about the first than the second.

The second view is normative because it does not concern itself with what the legislature actually wanted. While substantive mistakes are recognized as authoritative, choice of law mistakes are to be corrected by the courts. The normative view is explicitly value laden, giving the observer the right to contradict the substantive policy maker's choice of law preferences. In contrast, the descriptive view of choice of law aspires to value neutrality. Under the descriptive view, the choice of law decision is dependent upon the preferences of the legal institutions that framed the substantive rule, not upon the values of the observer.

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93. Weintraub, *supra* note 4, at 642.

In some circumstances, it is hard to tell whether a particular theory is descriptive or normative. The reason is that in many circumstances there is little or no evidence about what the legislature's choice of law preferences would be. In such cases, it seems reasonable for a court or scholar to impute to the legislature those values that the court or scholar finds most normatively appealing. This method has been referred to elsewhere as "constructive intent."<sup>94</sup> This sort of decision making is entirely reasonable when there is no evidence about actual intent. It resembles the traditional reliance on maxims of statutory construction or clear statement rules.<sup>95</sup>

The cases in which some evidence of actual intent exists are the ones which force a court or scholar to either fish or cut bait. When there is such evidence, an observer must decide which is more important: actual intent or personal normative premises. These indications of actual intent are more common than is ordinarily realized. True, legislatures infrequently attach choice of law provisions to their statutes. But any time an external observer has information about a state's choice of law decisions, he or she knows something about a policy preference on the choice of law issue. That is because choice of law decisions are made by authoritative interpreters of state policies—the courts.

Thus, when state *A* is considering whether a policy of state *B* would be furthered by application of state *B*'s law, it has authoritative guidance about what state *B* thinks the range of its law ought to be. State *A* is simply not competent to contradict state *B* about what state *B*'s policy is *as a descriptive matter*. Similarly, if the Supreme Court attempts to decide whether a policy of state *B* would be furthered by application of its law (because it is reviewing a state *B* decision for constitutionality), it is simply not competent to contradict state *B* *as a descriptive matter*. If state *B* has a policy preference that its liability limiting law be applied whenever the injury occurred within the state, that policy may be anachronistic or stupid. Still, it exists.

Is governmental interest analysis normative or descriptive? Currie tried to have it both ways. When it served his interests, he apparently tried to claim that it was descriptive. That is the underlying thrust of his methodology of "the ordinary processes of statutory construction and interpretation." The goal was effectuation of the policy preferences of state legislatures, which he hastened to point out are democratically elected bodies.<sup>96</sup> Furthermore, he emphasized that courts do not have the fact-finding capabilities to make the necessary empirical judgments.<sup>97</sup> Joseph Beale and the American Law Institute, obviously, were not democratically elected; nor did they have the fact-finding capabilities of legislatures, any more than did the courts that Currie criticized for frustrating legislative preferences.

More importantly, however, Currie's theory is normative and value laden. Clearly, to function as a constitutional theory it must be normative. Otherwise, some consumer activist legislature might constitutionally adopt some pro-consumer legislation and add a choice of law provision that the statute was designed to be applied

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94. Brilmayer, *supra* note 51, at 402.

95. *Id.*

96. B. CURRIE, *supra* note 5, at 182, 610, 617.

97. *Id.*

universally. It is quite possible to have a policy that local law should be applied whenever possible—at least in all those cases brought in forum courts. Choice of law provisions, however, do not lay constitutional doubts to rest even when they reflect legislative policies. The constitutional question concerns whether a state may do something that it admittedly wants to do according to its choice of law rules. Constitutional issues do not even arise except when the forum has an interest in the descriptive sense.

The modern theorists are apparently choosing the normative rather than the descriptive prong.<sup>98</sup> Perhaps it is because they silently realize that Currie's descriptive claims have been shown to be false. Or perhaps it is because, to them, the most important portion of Currie's system was the illustrative examples. These admittedly have normative underpinnings because they disregard the other state's choice of law preferences in deciding whether an interest exists. Modern theorists seem in agreement that state A should not consider state B's choice of law rules in making such determinations.<sup>99</sup> This switch from a confused descriptive/normative theory to an admittedly normative theory resolves some of the inconsistencies outlined above, but it presents serious problems of its own.

First, where do these normative preferences come from? How can they be justified? Proponents have nothing to offer in terms of empirical substantiation, and little in terms of theoretical justification. Perhaps the reason is that for a long time interest analysts did not feel the need to justify their assumptions. The assumptions were supposedly legislative in source, and legislatures have the right to make unexplained policy decisions. Now that that masquerade is over, it is time for interest analysts to explain why they think the results are sensible, practical, wise, or just.

Second, once the deliberate switch to normative underpinnings is accomplished, is it really fair to continue to call this exercise policy analysis? Such policy analysis places the function of policy making squarely in the hands of scholars and of any forum court that has adopted interest analysis. It denies that legislatures have the right to make policy on issues concerning territorial reach. It denies that other states have the right to formulate policy by making choice of law decisions. This is a mighty odd way to analyze policy. It allows less, not more, room for policy formulation than the traditional theories. It is a plausible approximation of what legislatures want only in those cases where the legislature has not spoken!

Moreover, all of the rhetorical arguments about democratic decision making and fact-finding capacity argue that legislatures, not scholars or courts, should be making these decisions. If a legislature adopts consumer protection laws, there is a chance that

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98. See, e.g., Allo, *supra* note 15, at 571.

99. See Allo, *supra* note 15. One possible exception is Weintraub. His statement is somewhat confusing. It is unclear whether he thinks that courts generally *do* use other states' conflicts rules or that they *should*. The former is clearly false; he gives one example and some hypothetical examples suggesting limited circumstances under which choice of law rules might be relevant. Weintraub, *supra* note 9, at 497, 502.

the laws are based on mistaken empirical assumptions, on misunderstanding about what is good for consumers, and so forth. But to say that legislatures are allowed to make that policy choice is precisely to say that they are allowed to be wrong. If the legislature concludes that it is best to apply the law to all sales within the state, they might be basing that decision on mistaken empirical assumptions. Or they might simply feel that the statute should be thus limited out of deference to other states. Or they might just be mesmerized by outdated territorialist dogma. Why is that not a legislative prerogative?

The normative approach raises a serious issue: apparently, a court or scholar ought to defer wholeheartedly to the legislature's substantive choice, and make every effort to effectuate it; but that court or scholar may simultaneously undermine, ignore, or constitutionally invalidate the legislature's choice of law preferences. Why are not substantive choices and choice of law preferences taken equally seriously? The answer is that under the normative view, choice of law decision making is not conceived as policy making at all. Once the substantive choice is made, the choice of law decision flows ineluctably from it. It does not go too far to characterize this sort of policy analysis as metaphysical, using exactly the same sense of the word that Currie did when he criticized the First Restatement. The ultimate irony of policy analysis of choice of law is that choice of law decisions are not conceived of as policy decisions at all.

## V. CONCLUSION

Perhaps interest analysis could be rebuilt if new foundations were provided. This would require several things. First, there would have to be a new definition of interest or policy which did not rely upon the transparent fiction of "ordinary processes of statutory construction and interpretation." This might be possible and even helpful.<sup>100</sup> Second, it would have to be shown that this definition gives rise to the paradigmatic applications that seem to form the true core of the modern interest analysis approach. Whether this is possible seems doubtful, given the problems outlined above. Third, it would have to be established that these interests, so defined, give rise to a constitutional reason for applying local law. To say that a law is a good law to apply in domestic cases does not automatically show that it is a fair law to apply to interstate disputes. Fairness to the complaining parties must be shown. The Constitution does not merely protect states from each other's irrationality. It also protects individuals from self-interested state overreaching and other states from rational but impermissible intrusions on their own prerogatives.

Modern analysts may wish to abandon some of these aspirations and scale their theories down to a more modest list of objectives. Already, they seem to be

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100. One reformulation of this goal for constitutional purposes is undertaken in Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981).

relinquishing some of the original claims that Currie made.<sup>101</sup> This is appropriate. Currie did not seriously address these foundational problems. He papered over inconsistencies and gaps in reasoning with “clearlys” and sometimes sarcasm.<sup>102</sup> We stand today just about where we stood when Currie finished the critical portion of his analysis: knee deep in metaphysical rubble.

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101. See *supra*, notes 12–15.

102. See B. CURRIE, *supra* note 5, at 95 (“of course” Massachusetts married women); *Supra* text accompanying note 48 (discussion of conclusory nature of interest analysis); B. CURRIE, *supra* note 5, at 131 (characterizing the First Restatement as “a system of law that . . . incit[es] the desire to change a just result because . . . unorthodoxy is hateful”); B. CURRIE, *supra* note 5, at 138 (sarcasm).

